

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002



Date Issued: August 19, 1999

Case No.: 1999-INA-0151

In the Matter of:

DAVID H. CAPLAN, T/A McDONALD'S, Employer,

on behalf of

ALAIN ABOUNA ASSEMIAN, Alien.

Appearance: Ladan Mirbagheri-Smith
Certifying Officer: Richard Panati, Region III

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application filed on February 24, 1997, by David H. Caplan, t/a McDonald's seeking labor certification for Alain Abouna Assemian, Alien, for the position of Supervisory Cashier (AF 100). The duties of the job were described as follows:

Supervise and coordinate workers receiving cash; keep records of funds received; assist in locating and reconciling errors on receipts; retaining next day's operating funds from daily receipts; allocating funds in registers; totaling funds received; preparing deposit slips.

Employer required that applicants have two years of experience in the job offered or two years of experience as a cashier or bookkeeper.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on September 9, 1998 (AF 96-98). The CO changed the job title from Supervisory Cashier (DOT code 211.137-010) to Assistant manager, Fast Food Services (DOT Code 185.137-010) because the business is fast food and the position involves assisting in managing the cashiers in a fast food outlet. The CO stated that the Specific Vocational Preparation (SVP) for a Manager, Fast Food Services is six months up to and including one year of combined education, training and experience; that therefore, Employer's requirement of two years of experience exceeds the SVP, and the norm for the position and is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2).

The CO instructed Employer that this finding could be rebutted by submitting evidence that the requirement arises from a business necessity. Employer was instructed that rebuttal evidence must include documentation from McDonald's franchise headquarters showing that Employer's job requirements are the minimum requirements established within McDonald's franchise for Supervisory Cashiers nationwide and information showing that McDonald's employees who had less than the minimum job requirements now required were unable to perform the duties of the position. In addition, Employer was instructed to prove that the job, as currently described, existed before the Alien was hired and was filled with the same job duties and requirements before the Alien was hired. The CO stated that documentation must include, but is not limited to, position descriptions, organizational charts, payroll records, resumes of former incumbents and copies of job advertisements for managerial positions in Employer's organization, not associated with labor certification applications, placed during the last three years. Employer was instructed that rebuttal must establish that the position and its present requirements existed before the Alien was hired and that if the job/requirements did not exist prior to the hiring of the

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Alien, then Employer must document that a major change in business operation caused the job to be created after the Alien was hired. Employer was also instructed that in the alternative it could reduce its requirements to the DOT standard.

Following the grant of an extension of time, Employer, by counsel, submitted rebuttal dated November 13, 1998. (AF 8-93) Employer objected to the change in job title to Assistant Manager, Fast Food Services stating that the job duties more closely fit those of a Supervisory Cashier; that the offered job requires a level of skill and experience which is far greater than that required of a mere basic Assistant Manager. Employer stated further that its business takes in about \$7,500.00 per day; that the benefit to Employer of hiring a skilled supervisor overseeing this activity is enormous; that mistakes and dishonesty could be quickly discovered and resolved. Employer stated in the alternative that a business necessity exists for the offered job; that 51 employees are on the payroll at any one time; that business generates a sales volume in excess of two million dollars per year with almost all of the receipts in cash in denominations up to twenty dollar bills; that given the low skill levels of employees hired to operate the cash registers and the high volume of cash, the probability of errors is high.

Employer stated further that the two year experience requirement arises from an urgent business necessity; that he requires that managers have at least two years of experience at the time of hire; that producing a fresh and healthy food product in a timely manner is a complicated process requiring the smooth integration of many steps and people. Employer stated further that the business operates with one general manager and five supervisors; that because of the high employee turnover, shifts are likely to have a new employee who must be trained and supervised; that if the supervisors are only minimally experienced they are in no position to be running the store and training new employees in jobs they may not be familiar with; that is why Employer requires two years of experience for assistant managers.

In addition, Employer stated that rebuttal included a list of 475 employees whose employment was terminated since 1994, copies of advertisements seeking experienced assistant managers and a list of managers, assistant managers and supervisory cashiers who when hired and promoted had the requisite two years of experience and a list of those who had less than two years experience and who had to be terminated because they could not perform the job duties in a satisfactory manner. Included also were employee work schedules.

The CO issued a Final Determination denying certification on December 16, 1998 (AF 2-7). The CO stated that the appropriate DOT classification for the offered job is Assistant Manager, Fast Food Services (DOT 211.137-010) because it includes coordinating activities of workers engaged in keeping business records collecting and paying accounts and collecting monies from in-house or take-out customers. The CO stated further that rebuttal indicates that the store is open 120 hours per week and that the Supervisory Cashier would only work 40 hours per week. Therefore, it appears reasonable to assume that assistant managers supervise the cashiers for 80 hours per week and perform the other duties assigned to the Supervisory Cashier in the cashier's absence.

The CO stated further that the employee lists submitted with rebuttal do not identify the positions the employees hold/held and does not establish that there is any correlation between the

amount of business that the store generates, the number of employees employed and the turnover rate in connection with the two year experience requirement. In addition, the CO stated that the lists showing 12 current or former managers who had/have two years of experience and who were/are successful and six former managers who lacked two years of experience and were unsuccessful provides no information as to which positions they held, what their actual qualification were at the time of hire, and how or why the employees were unable to perform the job duties. Moreover, the CO continued, the separate list of terminated employees does not list the six employees who you assert were unable to perform their jobs because they lacked two years of experience. Therefore, this rebuttal does not support the two year experience requirement.

The CO stated further that the three job advertisements for managers submitted with rebuttal do not list the amount of experience required and are not for Supervisory Cashier positions. In addition, the CO stated that Employer failed to provide position descriptions, organizational charts and resumes of former incumbents, as required in the NOF. The CO concluded that Employer had failed to prove that the offered job, as currently described, existed before the Alien was hired; that the job was previously filled with the same job duties and requirements before the Alien was hired; that a business necessity exists for the two year experience requirement or that a major change in the business caused the job to be created after the Alien was hired.

DISCUSSION

The principal issue is whether the two year experience requirement for the offered job is unduly restrictive.

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive job requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for and/or qualify for the job opportunity. The purpose of Section 656.21(b)(2) is to make the job available to qualified U. S. workers. *Venture International Associated, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). If an employer cannot document that the job requirements are consistent with those specified for the job in the DOT or are normal for the occupation in the United States then the regulation requires that employer establish a business necessity for the requirements. The Board defined how an employer can establish "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that employer demonstrate that the requirement bears a reasonable relationship to the occupation in the context of employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Piage & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993). Employer bears the burden of proof.

Employer provided no evidence that it currently employs or has ever employed a Supervising Cashier. The job advertisements submitted with rebuttal were for assistant manager positions (AF 77-79) and the employee lists do not identify any employees as Supervisory Cashiers. Therefore, it does not appear that the offered job existed prior to the Alien's hire.

Moreover, it is unclear why Employer needs to employ a supervisory cashier with a two year experience requirement other than in an effort to exclude otherwise qualified U.S. workers. It does not appear from the newspaper advertisements or the other documentation submitted in rebuttal that Employer requires two years of experience for supervisory personnel. None of the employee lists specify the extent of the listed employees experience at the time of hire or the positions they held/hold. Moreover the list of employees whose jobs were terminated does not contain the names of the six employees Employer contends were terminated because they were unable to perform their jobs due to a lack of two years of experience prior to being hired. In addition, Employer did not provide the position descriptions, organizational charts and resumes of former incumbents requested by the CO in the NOF.

The Supervisory Cashier that Employer wishes to hire would work 40 hours per week, whereas the store is open 120 hours per week. This raises the question of who supervises the cashiers for the remaining 80 hours per week. Since the Assistant Manager's job description includes supervising the activities of workers engaged in keeping business records, collecting and paying accounts and collecting money from in-house and take-out customers, assistant managers must supervise the cashiers. In this case, they would be supervising cashiers for two-thirds of the work week. As stated previously, the record does not document that assistant managers are required to have two years of experience prior to hire even though Employer contends that two years of experience is required. The SVP for an assistant manager is six months to one year of education, training and experience.

On the basis of this record, we agree with the CO that Employer has not proven that two years of experience required for the offered job bears a reasonable relationship to the occupation in the context of Employer's business or that the requirement is essential to performing, in a reasonable manner, the described job duties. Nor does the evidence demonstrate that a major change in business caused the offered job to be created. We also agree with the CO's reasoning that the appropriate title for the offered job is Assistant Manager, Fast Food Services (DOT 211.137-211.137-010). Accordingly, the two year experience requirement is unduly restrictive.

ORDER

The Certifying Officer's denial of Labor certification is hereby **AFFIRMED**.
For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

